IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DAVID KOENIG, Appellant. v. CITY OF LAKEWOOD, a municipal corporation of the State of Washington, Respondent.	No. 37761-6-II UNPUBLISHED OPINION

Hunt, J. — David Koenig appeals the trial court's favorable ruling in his public-records-request action against the City of Lakewood. He argues that the trial court erred in concluding that the redacted portions of records that the City had provided him were exempt from disclosure under the Public Records Act (Chapter 42.56 RCW) and the Criminal Records Privacy Act (Chapter 10.97 RCW). He also seeks additional trial court attorney fees and penalties on remand to the trial court as well as attorney fees on appeal. Holding that the trial court did not err in approving the City's redactions and did not abuse its discretion in determining Koenig's award of penalties and attorney fees, we affirm.

FACTS

I. Public Records Request

In October 2004, City law enforcement arrested off-duty Seattle Police Officer Daniel Espinoza for patronizing a prostitute; the City's police department generated two reports about the incident. In Lakewood Municipal Court, Espinoza signed a 12-month stipulated order of continuance, in which the City agreed to dismiss the prostitution charges after 12 months if he complied with certain conditions.

On November 11, David Koenig sent a Public Records Act (PRA) request to the City asking for "the case number and all investigative records" in Espinoza's case. On November 24, the City responded by letter, advising Koenig that he could access redacted copies of the police reports but that the unredacted reports were exempt from public disclosure under the Criminal Records Privacy Act (CRPA) because Espinoza's case did not result in a guilty finding. Two days later, Koenig asked the City to clarify its response by providing him with the specific statutory exemptions that it used to justify redacting or withholding the records he had requested.

On December 3, the City responded by letter, reiterating that because the incident had resulted in a "not guilty" finding, the redacted information was exempt from disclosure under the CRPA. The City cited *Hudgens v. Renton*, a case from Division One of this Court, which held that arrest reports are "investigative records" and, thus, are exempt from the PRA's disclosure requirements. 49 Wn. App. 842, 846, 746 P.2d 320 (1987), *review denied*, 110 Wn.2d 1014 (1988). Along with this letter, the City sent Koenig seven additional pages of redacted police reports. The City also allowed Koenig to review, but not to copy, the unredacted police report.

On January 13, 2005, Koenig contacted the City, questioning its reliance on *Hudgens* and asking whether it had obtained any additional records since his first request. The City wrote a letter to Koenig explaining that it was postponing its response to his records request until February 2005 "to allow [the] City Attorney's Office to complete a review," Clerk's Papers (CP) at 55; thereafter, however, the City failed to send any additional documents or otherwise to respond to Koenig's records request. During the next 11 months, Koenig neither renewed his request for records nor otherwise corresponded with the City.

On November 10, 2005, the Lakewood Municipal Court dismissed Espinoza's prostitution

case. On December 5, Koenig contacted the City, expanding his original request to include "all records concerning the prosecution or contemplated prosecution related to the above noted police report [on Espinoza's case]." CP at 637 (Finding of Fact 12). The City informed Koenig that the Municipal Court had dismissed Espinoza's case following a 12-month stipulated order of continuance, rendering some of the requested records "nonconviction data," which RCW 10.97 exempts from disclosure.

II. Procedure

A. Koenig's Lawsuit Against the City

On December 15, 2006, Koenig filed a *pro se* action against the City in Pierce County Superior Court, and he served the City with the summons and the complaint. Koenig's complaint asked the trial court to order the City: (1) to identify all records associated with his request for information about Espinoza's case and to explain how the claimed exemptions applied to the withheld records; (2) to provide all records to the trial court for an in camera inspection to determine whether the City had withheld them improperly; (3) to provide Koenig with copies of any record that the trial court might determine is not exempt from disclosure; (4) to award statutory penalties to Koenig in an amount that the trial court would determine under RCW 42.56.550(4), but no less than $5 per day for each day that the City had improperly withheld records; (5) to award attorney fees and costs to Koenig under RCW 42.56.550(4); and (6) to grant other such relief deemed equitable and just.

B. City's Motion To Dismiss and Koenig's Motion To Compel

In response, the City filed a "dispositive motion" to dismiss Koenig's lawsuit. The City asserted that it had complied with the PRA by allowing Koenig to review the unredacted police

reports he had requested and by providing him redacted copies. The City contended that the unredacted police reports were "nonconviction data," exempt under the CRPA, because the Municipal Court had dismissed the prostitution case described in the police reports Koenig sought. The trial court set a motion hearing for May 25, but it later granted Koenig's two requests for a continuance, ultimately rescheduling the hearing for August 3.

On June 18, Koenig moved to compel disclosure of public records and asked the trial court to deny the City's motion to dismiss and to grant him the relief requested in his complaint. Koenig then retained counsel, filed a response to the City's motion to dismiss, and filed a cross-motion to compel disclosure of the Espinoza records. Koenig contended that (1) Division One's *Hudgens* decision was erroneous, (2) the CRPA did not apply to a stipulated order of continuance, (3) the City had wrongfully withheld the records, and (4) the City had failed to comply with RCW 42.56.210(3) and the *Progressive Animal Welfare Society v. Univ. of Wash.* requirement that an agency must identify the records and explain why the records are being withheld if it believes that they are exempt in their entirety. 125 Wn.2d 243, 271, 884 P.2d 592 (1994). The City filed a response, asserting that it had complied with the CRPA.

C. Koenig's Additional Records Requests to the City While Lawsuit Pending

Meanwhile, on May 16, Koenig sent the City a letter asking it to reexamine his December 5, 2005 records request and to furnish the following records: (1) communications with Espinoza's attorney; (2) court filings, including motions, orders, discovery issues, conclusions of the prosecuting attorneys, and plea proposals; and (3) any documents about the final disposition of Espinoza's case. Koenig also asked the City to compile an exemption log, listing its claimed exemptions pertaining to his records request. On June 13, the City's attorney advised Koenig that

the City possessed no records of the type that he had described in his original request.

On June 19, Koenig again contacted the City by letter, requesting all records related to the prosecution of the Espinoza incident and the "exemption log." Koenig asked the City Attorney to respond in writing "so that there is a lasting record for the courts." CP at 640 (Finding of Fact 33). On July 9, the City sent Koenig a letter with 22 pages of records, but the City mistakenly addressed this letter to "Daniel" (instead of "David") Koenig and sent it to his former address. Consequently, Koenig did not receive the City's letter and enclosed records until July 23.

D. Trial Court Rulings

On August 3, the trial court ruled that the City had violated the PRA as of December 2005, and it ordered the City to comply with the RCW 42.56.210(3) requirements by August 17.[1] On August 10, the City gave Koenig an exemption list, 34 pages of responsive pleadings, and a two-page "withholding index." The City then filed a "motion and declaration for ruling pursuant to the public records act," asking the trial court to issue an order declaring that the City had "fully responded" to Koenig's original request for information.

On August 15, the trial court issued a Revised Order on Motions, stating that (1) it "adhered" to *Hudgens*; (2) the final dismissal of a misdemeanor case under a stipulated order of continuance was not an "adverse disposition" under the CRPA; (3) by August 17, the City must provide Koenig and the trial court with a detailed list of each responsive document withheld in its

[1] The trial court issued the following ruling:

> The City shall by August 17, 2007 provide to the plaintiff and the Court a detailed list of each responsive document withheld in its entirety, describing the document as required by [*Progressive Animal Welfare Society*,] 125 Wn.2d 243, including a specific explanation of the exemptions claimed with further elaboration of an claim of "work product."

CP at 642 (Finding of Fact 42.)

entirety, including specific explanations for any claimed exemptions; and (4) by August 17, the City must provide Koenig and the trial court with an explanation of how it had applied exemptions to redact specific documents it had provided to Koenig.

On August 28, Koenig filed a response to City's motion for ruling pursuant to public records act, highlighting exemption claims in the redacted records that he asserted were erroneous. On August 29, the City conceded that (1) the dates of birth in Espinoza's records were not exempt, (2) the records it had redacted contained no financial information, and (3) these records contained no victim or witness information. At an August 30 hearing, the trial court ruled that the City had failed to comply fully with the PRA, and it directed the City to clarify its exemption claims.

E. City Complies

On September 7, the City filed and gave the trial court and Koenig a "disclosure chart answer pursuant to public records act," in which it revised its existing exemption claims, asserted new exemption claims, and provided new unredacted copies of certain records. The City relied on the CRPA to justify the redactions of exempted information:[2] Under the "Criminal History Report" section, the City redacted two items[3] as "nonconviction data"; under the "Case History Reports" section, the City redacted a charge/finding, a defendant case history query, and an FBI number as "nonconviction data." For the remaining exempted redactions, the City relied on: (1) RCW 46.12.380, which governs "disclosure of names and addresses of individual vehicle owners"

[2] The City did not rely on *Hudgens* as the basis for any of its redactions.

[3] Specifically, the City redacted the Criminal History Record Information number and the Tacoma Police Department number because they are individual identifiers and, thus, are exempt from disclosure under RCW 10.97.

and allows redaction of information about vehicle license and VIN numbers; and (2) RCW 46.12.390 to justify its redaction of Washington State identification numbers, endorsements, driving record abstracts, and driver's license information.[4]

F. Trial Court's Final Ruling and Assessment of Penalties and Fees

As Koenig had requested, the trial court reviewed the City's records and documents in camera. In a September 12 written order, the trial court ruled that the City "had fully complied and responded to the original request for public records in this matter" as of September 7, 2007.

Koenig moved for statutory penalties, attorney fees, and costs. He asked the trial court to impose the maximum penalty against the City of $100 per day for 636 days (totaling $63,600) and to award him reasonable attorney fees of $300 per hour for 97 hours (totaling $29,100) and costs (totaling $295). The trial court assessed penalties and attorney fees against the City and entered its "Findings of Fact, Conclusions of Law and Order Awarding Attorney's[sic] Fees Pursuant to RCW 42.56.550(4)." CP at 633.

In its conclusions of law, the trial court ruled that: (1) the City had violated the PRA and unlawfully withheld records; (2) Koenig was entitled to statutory penalties, attorney fees, and costs under RCW 42.56.550(4); (3) penalties could not be assessed for the time period before Koenig filed his lawsuit; (4) December 9, 2005, was the first date that the City had wrongfully withheld records from Koenig; (5) although the City had failed to comply with the PRA initially, it was in full compliance with the PRA as of September 7, 2007; (6) 636 days had elapsed during the "penalty time period" from December 9, 2005, to September 7, 2007, 159 days of which it attributed to delay that Koenig had caused;[5] (7) during the 159-day delay that Koenig had caused,

[4] The City also relied on RCW 42.56.240(4) to justify its redaction of other license information.

[5] The trial court found that Koenig had delayed service of his December 2006 complaint until

he should receive the minimum penalty of $5 per day because "the City was acting in good faith, but mistakenly;" and (8) for the remaining 477-day period, Koenig should receive a penalty of $25 per day because the City had acted negligently by failing to exercise ordinary care.

The trial court also found that Koenig's counsel had spent 113.9 hours on the public records request litigation, ruled that a $250-hourly rate was reasonable in light of the attorney's experience, and calculated $28,475 in attorney fees to which Koenig was entitled. The trial court ordered the City to pay Koenig $12,720 in penalties, $28,475 in attorney fees, and $295 in costs. Koenig did not challenge any part of the trial court's ruling, seek reconsideration, or request additional records, penalties, or attorney fees.

Koenig appeals the trial court's decision in his favor.

ANALYSIS

Koenig asks us, for the first time on appeal, to reject *Hudgens* and to remand to the trial court to order the City to produce again the same documents, unredacted, and to award additional penalties and attorney fees. We deny this request. The record shows the trial court correctly determined that the City's redactions were exempt from disclosure and did not abuse its discretion in determining Koenig's award of penalties and attorney fees.

I. Standard of Review

The Public Records Act specifies that courts review all agency actions taken or unchallenged under RCW 42.56.030 through 42.56.520 de novo. RCW 42.56.550(3); *Progressive Animal Welfare Soc.*, 125 Wn.2d at 252; *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 430, 98 P.3d 463 (2004). Appellate courts stand in the same position as the trial court when the record consists of only affidavits, memoranda, and other documentary evidence.

March 14, 2007 (89 days), and that Koenig had requested two continuances (70 days).

Progressive Animal Welfare Soc., 125 Wn.2d at 252. But appellate courts review a trial court's determination of penalties and attorney fees for an abuse of discretion. *Yousoufian*, 152 Wn.2d at 430-31 (quoting RCW 42.17.340(4)).

An abuse of discretion occurs when the trial court's order or decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Ryan v. State*, 112 Wn. App. 896, 899, 51 P.3d 175 (2002) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A trial court's decision is manifestly unreasonable "if it is outside the range of acceptable choices, given the facts and the applicable legal standard." *Ryan*, 112 Wn. App. at 899 (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). A trial court's decision is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or if the facts do not meet the requirements of the correct standard. *Ryan*, 112 Wn. App. at 900 (citing *Littlefield*, 133 Wn.2d at 47).

II. Washington's PRA and CRPA

The PRA "is a strongly worded mandate for broad disclosure of public records." *Progressive Animal Welfare Soc.*, 125 Wn.2d at 251 (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). Courts must construe the PRA's disclosure provisions liberally and its exemptions narrowly. *Progressive Animal Welfare Soc.*, 125 Wn.2d at 251; RCW 42.17.010(11). RCW 42.56.550(1) provides for "judicial review of agency actions," stating that, "The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." Unless the requested record falls within a specific

exemption of the PRA, or other statute that exempts or prohibits disclosure of specific information or records, the agency must produce the record. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 730, 174 P.3d 60 (2007); RCW 42.56.070(1).[6]

Materials protected under the Criminal Records Privacy Act (CRPA) are exempted from production under the PRA. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 615-16, 963 P.2d 869 (1998); RCW 10.97.080. The CRPA generally prohibits criminal justice agencies from disseminating materials identified as "nonconviction data"; and members of the public cannot reproduce such information unless they are the subjects of the information. *Beltran v. Dep't of Soc. & Health Servs.*, 98 Wn. App. 245, 259-60, 989 P.2d 604 (1999).

The CRPA also authorizes persons who believe themselves to be the subject of a criminal record to review and to challenge criminal history record information. RCW 10.97.080. This procedure is consistent with the statutory directive that certain criminal history must be complete, accurate, confidential, and secure. RCW 10.97.010.

In addition, the CRPA prevents dissemination of "nonconviction data," RCW 10.97.040, which it defines as follows: "[A]ll criminal history record information relating to an incident which has not led to a conviction or other disposition adverse to the subject, and for which

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[6] RCW 42.56.070 provides the following direction about the type of "documents and indexes to be made public":

> (1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (6) of this section, this chapter or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; *however, in each case, the justification for the deletion shall be explained fully in writing.*

RCW 42.56.070(1) (emphasis added).

proceedings are no longer actively pending." RCW 10.97.030(2). The CRPA defines "criminal record history information" as follows:

> [I]Information contained in records collected by criminal justice agencies, other than courts, on individuals, consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, including acquittals by reason of insanity, dismissals based on lack of competency, sentences, correctional supervision, and release.
>
> The term includes information contained in records maintained by or obtained from criminal justice agencies, other than courts, which records provide individual identification of a person together with any portion of the individual's record of involvement in the criminal justice system as an alleged or convicted offender.

RCW 10.97.030(1).

III. Failure to Assign Error

Koenig broadly argues that the trial court erred in entering its Revised Order on Motions, PRA Ruling and Findings of Fact, Conclusions of Law and Order Awarding Penalties and Attorney Fees. But Koenig fails to assign error to any of the trial court's findings of fact or conclusions of law. Moreover, outside the *Hudgens* framework, he fails to present any argument to support his contention that the trial court erred in concluding that the City's redactions were proper.

A. Findings of Fact

RAP 10.3(g) requires an appellant to assign error to each finding of fact that he claims the trial court entered in error.[7] We treat as verities on appeal any finding of fact to which the appellant has not assigned error. *Harris v. Urell*, 133 Wn. App. 130, 137, 135 P.3d 530 (2006),

[7] RAP 10.3(g) provides:

> A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in the assignment of error or clearly disclosed in the associated issue pertaining thereto.

review denied, 160 Wn.2d 1012 (2007). Because Koenig has failed to assign error to any of the trial court's findings of fact or to disclose them in the associated issues, we treat them all as verities on appeal.

Accordingly, we now deem as true the following unchallenged findings: (1) the City complied with the PRA as of September 7, 2007; (2) the penalty assessed against the City during the 159-day period when it acted in good faith, but mistakenly, should be $5 per day; (3) the penalty assessed against the City for the remaining 477-day period, when it acted negligently, should be $25 per day; (4) an award of $28,475 for attorney fees is reasonable and necessary; and (5) Koenig should receive $295 in costs.

B. Lack of Support for Arguments

RAP 10.3(a)(6) requires an appellant to include argument in his brief that supports the issues presented for review, together with citations to legal authority. *State v. Olson*, 126 Wn.2d 315, 320, 893 P.2d 629 (1995). When an appellant fails to raise an issue in the assignments of error and fails to present supporting argument or legal citations, we will not consider the merits of that issue. *Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 582, 915 P.2d 581 (1996) (citing *Olson*, 126 Wn.2d at 321), *review denied*, 130 Wn.2d 1009 (1996). Thus, even an appellant who assigns error to a trial court ruling, but fails to provide supporting argument, "is deemed to have abandoned it." *In re Marriage of Lutz*, 74 Wn. App. 356, 372, 873 P.2d 566 (1994).

Koenig's argument that the trial court erred in allowing redaction of requested records depends entirely on his interpretation of *Hudgens*. Aside from his analysis of *Hudgens*, Koenig fails to support his argument on appeal with legal reasoning and citation to law. We need not address *Hudgens*, however, because the City based none of its redactions on that case; nor did the

trial court's ruling address it. As the City notes, Koenig's *Hudgens* argument focuses on an early (August 3, 2007) trial court ruling that it would adhere to Division One's decision in *Hudgens*. But when the trial court made its final ruling on September 12 and determined that the City had fully complied with Koenig's PRA requests, it did not discuss *Hudgens* or implicate its holding. Instead, the trial court ruled that the City's redactions were exempt from disclosure on several bases—none of which included an "investigative records" exemption, the subject of *Hudgens.*[8]

Based on the CRPA's exemption for "nonconviction data," the City redacted Espinoza's Tacoma Police Department number, FBI number, and criminal history record information number, which are exempt from disclosure as "individual identifiers" under RCW 10.97. The City also redacted Espinoza's prostitution charge as "nonconviction" data because the Municipal Court had since dismissed this charge. And, based on the PRA's exemption for license and vehicle registration numbers, the City redacted Espinoza's state identification and driver's license numbers under RCW 46.12.390. As the record demonstrates, the City based none of its redactions on the "investigative records" exception discussed in *Hudgens*.

Again, apart from his inapplicable *Hudgens* argument, Koenig failed to support his contention that the City's redactions were improper.[9] For this reason, we hold that Koenig has

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[8] In *Hudgens*, Division One of our court concluded, without analysis, that redactions of "arrest reports" are exempt from disclosure because they constitute "investigative records" under RCW 42.17.310(1)(d). *Hudgens*, 49 Wn. App. at 846.

[9] Although in his reply brief Koenig eventually articulated an argument about why the City's five redactions were improper, he failed to make any specific arguments in his opening brief. The Rules of Appellate Procedure forbid an appellant from raising arguments for the first time in a reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (citing *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) (an issue raised and argued for the first time in a reply brief is too late to warrant consideration)).

waived these issues, and we do not further consider them.[10]

IV. Attorney Fees

Koenig also argues that he is entitled to (1) additional attorney fees below under RCW 42.56.550(4) for his CRPA-related claims and (2) attorney fees associated with this appeal if we reverse the trial court's decision. But the record demonstrates that the trial court did not abuse its discretion in determining a reasonable amount of attorney fees; and we do not reverse the trial court.

In his motion for statutory penalties attorney fees and costs, Koenig requested "reasonable attorney fees" in the amount of $29,100 (97 hours at $300 per hour). The trial court found that Koenig's counsel had spent 113.9 hours on the public records request litigation and concluded that a $250-hourly rate was reasonable in light of the attorney's experience and efficiency and the terms of his agreement with Koenig. The trial court awarded Koenig $28,475 in attorney fees.

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[10] We do not lightly cite the RAP to avoid addressing the merits of an appeal. But here, we note that Koenig prevailed below and his arguments, attempting to challenge the trial court's favorable ruling for the first time on appeal, are unclear and undeveloped. Thus, Koenig's procedural defaults are more than mere technicalities; they prevent us from identifying and reviewing whatever errors he believes the trial court made.

The trial court ruled in Koenig's favor and granted him all the relief he sought in his complaint, in which he asked the trial court to order the City: to identify all records associated with his request; to explain how the claimed exemptions applied to the withheld records; to provide all records to the trial court for an in camera inspection; to provide him with copies of any record not exempt from disclosure; to award him statutory penalties in an amount that the trial court determined under RCW 42.56.550(4), *but not less than $5 per day* for each day that the City improperly withheld; and to award him full attorney fees and costs under RCW 42.56.550(4).

In its final ruling the trial court ruled that the City's remaining redactions were properly exempt from disclosure. On this basis, the trial court determined that the City had fully complied with Koenig's request for information. Then the trial court awarded the penalties that Koenig had requested ($5 per day for the first 159-day period; $25 per day for the 477-day period), despite finding that Koenig was partially responsible for the delay and that "the City was acting in good faith, but mistakenly." The trial court also granted Koenig's request for attorney fees in the amount of $28,475. Thus, the record demonstrates that Koenig received the relief he requested from the trial court.

The record shows that the trial court based its decision on a reasonable determination of the time and costs expended during the litigation process. The trial court determined that a $250 hourly rate was reasonable, stated its reasons for this determination, and added 16.5 additional hours to the calculation, beyond the amount that Koenig had requested. Accordingly, because the trial court based its decision on tenable grounds and for tenable reasons, we find no abuse of discretion. And because we do not reverse the trial court's decision, Koenig is not entitled to attorney fees on appeal.[11]

Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, P.J.

Armstrong, J.

[11] The City does not request attorney fees on appeal.